

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDDIE L. DILLARD,

Petitioner,

vs.

Case No. 03-CV-71269
HON. GEORGE CARAM STEEH

WILLIE O. SMITH, (WARDEN),

Defendant.

ORDER DENYING CERTIFICATE OF APPEALABILITY AND
DENYING PETITIONER'S MOTION FOR LEAVE TO PROCEED ON APPEAL
IN FORMA PAUPERIS AS MOOT (#64)

On June 18, 2008, this court denied petitioner Eddie Dillard's motion under Federal Rule of Civil Procedure 60(b)(3) for relief from his January 22, 1997 state court jury based convictions on three counts of first degree criminal sexual conduct, M.C.L. § 750.520b, and his February 4, 1997 sentence on the three convictions and a fourth habitual offender conviction, M.C.L. § 769.12, to four concurrent 25 to 50 year terms of incarceration. On September 9, 2008, the court denied Dillard's motion for reconsideration of the June 18, 2008 Order. On September 29, 2008, the court denied Dillard's "second" motion for relief from judgment. Dillard moved on October 24, 2008 for leave to proceed on appeal in forma pauperis.

An unsuccessful movant for relief from judgment under Rule 60(b) must obtain a certificate of appealability under 28 U.S.C. §2253 before his appeal of the denial of the motion can be heard. United States v. Hardin, 481 F.3d 924, 926 (6th Cir. 2007). Unless a district or circuit court judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from a final order in a proceeding under § 2255. 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability may issue "only if the applicant has made a

substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). Dillard's motion for relief from judgment was denied as both untimely and frivolous, and thus failed to make a substantial showing that he was denied a constitutional right. Accordingly,

A CERTIFICATE OF APPEALABILITY is hereby DENIED as to this court's June 18, 2008 Order denying Dillard's motion for relief from judgment. Dillard's motion for leave to proceed on appeal in forma pauperis is hereby DENIED as MOOT in that an appeal cannot be taken unless the circuit court issues a certificate of appealability.

SO ORDERED.

Dated: October 30, 2008

s/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

Copies of this Order were served upon attorneys of record on October 30, 2008, by electronic and/or ordinary mail.

s/Josephine Chaffee
Deputy Clerk